IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1971

Docket No.

JOEL BERNARD REISMAN,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Involved	2
Constitutional Amendments – Amendment IV Searches and Seizures	3
Amendment XIV – Citizenship; Privileges and Immunities Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement	3
New York State Statute (Penal Law) Section 220.20 – Criminal Possession Of A Dangerous Drug In The First Degree:	4
Statement Of The Case	4
Proceedings In California	7
Reasons for Granting the Writ	8
Conclusion	16

Appendix

Appendix A – Remittitur	A-1
Appendix B – Opinion	B-1

Cases Cited

Cooledge v. New Hampshire, 403 U.S. 443, 468, 470-471 (1972)	14

Page

Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966). cf. Gambino v. U.S. 275, U.S. 310 (1927) 12

Elkins v. United States, 364 U.S. 206 (1960) 8

John Peter Abt v. The Superior Court of Los Angeles County, 82 Cal. Rptr. 481, 1 Cal. 2d 418, 462 P. 2d 10 7

Jones v. United States, 362 U.S. 257 9

Knoll Associates, Inc. v. Federal Trade Commission, 397 F. 2d 530 (7th Cir., 1969) 13

Leary v. United States, 395 U.S. 6 (1969) 15

People v. Defore, 242 N.Y. 13, 22-23 (1926) 9

People v. Nettles, 23 Ill 2d 306, 308 15

People v. Reisman, 29 N.Y. 2d 278 (1971) 1

Rea v. United States, 350 U.S. 214 (1956) 9

Silverthorne v. United States, 251 U.S. 385, 392 (1920) 12

Simmons v. United States, 390 U.S. 377 (1968) 9

Smith v. Rhay, 419 F. 2d 160, 162-163 (9th Cir., 1969) 13

United States v. Blok, 188 F. 2d 1010 (D.C. Cir., 1951) 13

United States v. Paroutian, 299 F 2d 486, 489 (2d Cir., 1962) 11

Whitely v. Warden, 401 U.S. 560 (1971) 9

Wong Sun v. United States, 371 U.S. 471 (1963) 11

Other Authorities

Page

New York State Statute (Penal Law) Section 220.20 4

United States Constitution, Art. 4, Sec. 1 10

United States Constitution, Fourth Amendment 2

28 U.S.C. 1257 (3) and Rule 22(1) of the Rules of the Supreme Court of the U.S. 2



SUPREME COURT OF THE UNITED STATES

JOEL BERNARD REISMAN,

Petitioner,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Joel Bernard Reisman, prays that a writ of certiorari issue to review a final judgment and order of the Court of Appeals of the State of New York entered November 18, 1971, (Appendix A, infra), which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered on October 19, 1970, affirming a judgment of conviction rendered against Petitioner in the Supreme Court of the State of New York, Queens County, on September 14, 1968, convicting petitioner after trial by jury, of criminal possession of a dangerous drug in the first degree.

OPINION BELOW

The opinion of the said Court of Appeals of the State of New York is reprinted herein in Appendix B, infra. This opinion is contained in People v. Reisman, reported in 29 N.Y. 2d 278 (1971).

JURISDICTION

The judgment and order of the Court of Appeals is dated and was entered November 18, 1971. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3) and Rule 22(1) of the Rules of the Supreme Court of the United States.

QUESTIONS INVOLVED

1. Whether the government of one state may use in a criminal prosecution evidence seized by its police pursuant to information received in cooperation with the police of a sister state who initially seized that same evidence in violation of the Fourth Amendment and where the highest court of that sister state ordered suppression of that same evidence.

2. Whether the possibility that the police might have made an arrest on information hypothetically received from an independent source entitles them to use evidence actually seized in reliance on information secured during a police search in violation of the Fourth Amendment.

3. Whether a search made by an airlines employee in cooperation with, and pursuant to police request, for the sole purpose of aiding the police in the discovery of marijuana, is a private search outside the proscriptions of the Fourth Amendment.

4. Whether the failure of the police to secure a warrant for the search of the packages and the seizure of Petitioner, when they had planned in advance to make the arrest and search, when they had ample time to secure the warrant, and when the evidence was in no danger of destruction or loss, requires that the evidence thus seized be suppressed.

5. Whether petitioner's conviction for possession of a

package containing marijuana at the airport where he had just claimed it for the addressee, deprived him of due process of law when there was no evidence that he had any knowledge of the contents of the package.

CONSTITUTIONAL AMENDMENTS

AMENDMENT IV

Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects (against unreasonable searches and seizures), shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

CITIZENSHIP: PRIVILEGES AND IMMUNITIES DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATE STATUTE (PENAL LAW)
Section 220.20

CRIMINAL POSSESSION OF A DANGEROUS DRUG IN THE FIRST DEGREE:

A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or (ii) one or more ounces, containing cannabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the first degree is a class C felony. L. 1965, c 1030, eff. Sept. 1, 1967.

STATEMENT OF THE CASE

Petitioner, Reisman, was arrested with Mario Di Eramo on February 12, 1968, at Kennedy airport in New York. On February 29, 1968, he and his co-defendant were indicted in the New York Supreme Court, Queens County, on three counts of criminal possession of a dangerous drug in the first, second and fourth degrees. They were arraigned on that indictment March 20, 1968, and on September 4, 1968, a hearing was begun on petitioner's motion to suppress the evidence.

Richard Dunkel, an American Airlines freight agent at Los Angeles International Airport, testified at the suppression hearing that he accepted from a "hippie type" two packages for shipment to New York on February 11, 1968 (A62, 78).*

*( ) All "A" numbered references are to pages in the record on appeal.

The "hippie type" was later identified as John Peter Abt. The packages were addressed to another person in care of petitioner herein.

Dunkel further testified that he had had several prior conversations with California narcotics policemen about marijuana shipments coming through his office. "Whenever they did come in on previous shipments that they picked up at the airport". (A76). Although his supervisor had never advised him as to a policy concerning possible shipments of marijuana (A74), and although his supervisor declined to take responsibility for his opening the specific package deposited by John Peter Abt, leaving it up to him; the police had told him to be on the lookout for "any suspicious people or hippie type looking people" who might be engaged in shipping marijuana (A73-74, 78, 86). He thought he had a right to open and inspect any packages (A62).

Mr. Dunkel opened only one of the two Abt packages and saw therein what he assumed was marijuana. He then told his supervisor who called the police. A policeman named Wanak came, inspected the packages already opened by Dunkel and then opened the other package. The Los Angeles police verified there was marijuana in the packages (A70-75). The police did not show Dunkel a search warrant, nor was he aware that anyone was under arrest (A81).

Detective Michael Tobin testified that on the night of February 11, 1968, at 11:45 P.M. he received a telephone call from Sergeant Fred McKnight of the Los Angeles police department. Detective Tobin knew Sergeant McKnight, whom he had met in Los Angeles with whom he had had dealings "dozens of times", and who had supplied him with reliable information leading to convictions on numerous occasions (A10-11, 41). McKnight told Tobin that two cartons were due to arrive at Kennedy Airport, the contents of one he had seized and replaced with sand, and the contents of the other

he had filled with twenty-three bricks of marijuana (A52). McKnight told Tobin that nobody had been arrested, and Tobin didn't know if there had been a warrant for the search in Los Angeles; an airlines employee had found the marijuana (A54). Detective Tobin further testified that Sergeant McKnight may have told him about initialed markings on the bricks, since this was the procedure they had used on other occasions (A55). McKnight described the shipment, the quantities, the names of the consignees (George Carlton c/o Tanker Reisman), the flight time and number, and the number on the air bill (A57, 59, 60).

Detective Tobin further testified that the next morning at 6:30 A.M. he went to Kennedy Airport; the packages arrived at 7:00 A.M. He saw the previously described boxes and he smelled the odor of marijuana emanating from one of them (A12, 14, 27-28). Detective Tobin kept the cartons under observation for sixteen hours until petitioner arrived at 11:00 P.M., during which time he made no attempt to obtain a search warrant or arrest warrant (A14, 35). When he arrived at the airport petitioner identified himself to Detective Tobin, who was dressed as an American Airlines employee. Petitioner signed an air bill, picked up the package and was arrested as he was carrying it to his car (A13-21). Detective Tobin searched Petitioner and found on his person a check payable to petitioner with an endorsement to Peter Abt (A25-27).

Detective Tobin further testified that all his information on this case came from the Los Angeles police (A41, 59).

Petitioner's motion to suppress the evidence was denied on September 14, 1968, and trial was begun on December 16, 1968, wherein the testimony of Detective Tobin was substantially the same as that he gave at the suppression hearing. In addition, two agents of the Federal Bureau of Narcotics and Dangerous Drugs who had assisted Detective Tobin at Kennedy Airport, Agents Robert C. Manning and

Frances E. White, corroborated the facts testified to by Detective Tobin.

Patrolman Manfred Fisher, a police chemist, testified at the trial that the packages seized by Detective Tobin contained ninety-five pounds of marijuana (A94-103).

Petitioner did not testify, but his co-defendant Mario DiErano testified he was accompanying petitioner to the airport and knew nothing of the specific nature of Petitioner's errand. He was acquitted of all charges.

Petitioner was found guilty of the first count of the indictment and not guilty of the second count; the third count had been dismissed by the trial judge. On May 13, 1969, petitioner was sentenced to five years imprisonment.

PROCEEDINGS IN CALIFORNIA

The airlines clerk, Richard Dunkel, had written down the license plate number of the car driven by John Peter Abt, after the latter deposited the cartons with him. Abt was arrested in California and his motion to suppress the evidence was denied by the California Superior Court. On appeal, to the Supreme Court of California, a writ of mandate was issued by that Court directing the Superior Court of Los Angeles "to suppress the marijuana seized at the airport and the fruits of the seizure" (A144-147). John Peter Abt v The Superior Court of Los Angeles County, 82 Cal. Rptr. 481, 1 Cal. 2d 418, 462 P 2d 10. The California Supreme Court basing its decision on the failure of the Los Angeles police to obtain a search warrant for the cartons at the Los Angeles airport, expressly recognized, but did not resolve, the question of the nature of the search conducted on behalf of the police by the airlines clerk.

REASONS FOR GRANTING THE WRIT

After a search conducted by the Los Angeles police later determined to be unlawful by the California Supreme Court (Abt. v The Superior Court of Los Angeles County, 82 Cal Rpter 481) and assumed to be unlawful by the courts of New York State in their deposition of this Case, the Los Angeles police forwarded the evidence seized and altered to New York and informed the New York police of the circumstances surrounding the seizure. Pursuant to that information the New York police arrested petitioner herein, seized same evidence and used that evidence in the instant prosecution of petitioner. The writ of certiorari should issue because notwithstanding testimony to the effect that the New York police and the Los Angeles police were involved in a continuing scheme of cooperation in this case and in cases such as this one, the holding of the New York State Court of Appeals (see Appendix herein) is that a search and seizure by the Los Angeles police in violation of the Constitution should not "handicap" the police in New York. We submit that such a holding defeats the effort of the California Supreme Court to insure the obedience of its law enforcement authorities to the Federal Constitution, when that Court specifically held the search and seizure in California to be unlawful, suppressed the evidence thus obtained and reversed the judgment of conviction in California against one John Peter Abt. The effect of the New York Court of Appeals decision is to sanction invasions of Fourth Amendment rights by the police of another state, since the fruits of those invasions, whether or not admissable in that other state may be handed over to the New York police. Whenever the prosecution is to take place in New York, the California police are free to operate outside the proscriptions of the Fourth Amendment. Such a result is directly contrary to this Court's interpretation of the exclusionary rule's application to inter-jurisdictional criminal prosecutions. In Elkins v United States, 364 U.S. 206 (1960), articles obtained as the result of an unreasonable search and

seizure by state officers could not be introduced in evidence against a defendant in a federal criminal trial. This rule mandated so "there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigations" Elkins v United States, supra, at 222, cf. Rea v United States, 350 U.S. 214 (1956). This Court quoted with approval in Elkins the statement of Mr. Justice Cardozo, "The professed object of the trespass rather than the official character of the trespasser should test the rights of government." People v Defore, 242 N.Y. 13, 22-23 (1926). The view of the New York Court of Appeals is that the New York police who did not make the actual illegal search of the packages in California (upon which appeared petitioner's name and the New York destination*), were thus entitled to proceed in New York against petitioner insulated from the illegal conduct of the California police upon whom they depended for their information. This view is directly in conflict with the rationale of this Court's recent decision in Whitely v Warden, 401 U.S. 560 (1971). There, the Sheriff of Carbon County, Wyoming complained to a magistrate against two named men as the perpetrators of a crime. The magistrate issued an arrest warrant on the basis of the conclusionary complaint of the Sheriff and a radio bulletin was broadcast. The Laramie Police, relying on the radio bulletin, arrested the two men. The State of Wyoming argued in that case, as does New York State in this case, that the arresting officers were performing their duties free of illegality when they themselves made the arrest on the basis of a communication from fellow officers, and that to prevent arresting officers from assuming that their fellow officers' gained information by lawful means would "unduly hamper law enforcement." This Court held in the arrest must fall:

"We do not, of course, question that the Laramie police

*The New York Courts assumed petitioner's standing to object to the California search. Simmons v United States, 390 U.S. 377 (1968); Jones v United States, 362 U.S. 257.

> were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers to make the arrest. Whitely v Warden, supra at 568.

Thus, from petitioner's point of view, his arrest, conviction and sentence are the result of California and New York police action working as one authority, and to say there was no collusion between them is to fly in the face of the actualities. Detective Tobin testified in New York that he had a working relationship with Sergeant McKnight in California and that all his information on this case came from Sergeant McKnight. The rationale of the Whitely case is that illegal police action may not be justified to dilute the exclusionary rule simply by fragmenting that working relationship into separate counties or separate states or separate police officers. The California Supreme Court had determined that its police acted contrary to the Fourth Amendment with respect to property sought to be used as evidence against petitioner; Full Faith and Credit to that determination, together with the mandate of Mapp v Ohio, 367 U.S. 643,655 (1961) "that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority inadmissable in a state court", required the suppression of the evidence in New York. United States Constitution, Art. 4, Sec. 1.

II

The New York Court of Appeals found, "to be sure, when Tobin (New York Detective) placed the cartons under surveillance and subsequently arrested defendant, he

undoubtedly relied on all the information from Sergeant McKnight (California police)", but the Court proceeded to base its decision on what Detective Tobin might have done had he not received *all* his information from Sergeant McKnight. The Court hypothesized that Detective Tobin could have made the arrest and seizure in New York had he received information directly from Richard Dunkel the airlines clerk who, under California police auspices, made a "private" search of the packages. The Court of Appeals using a hypothetical set of facts, instead of the actual case presented to it, misapplied this Court's rule on independent untainted evidence, Wong Sun v United States, 371 U.S. 471 (1963). "The test must be one of actualities, not possiblities." United States v Paroutian, 299 F 2d 486, 489 (2d Cir., 1962).

The actualities here are that the New York police obtained their information, all of it, and all of their evidence from the California police, who during their search of the packages without a warrant, made the definite determination the packages contained marijuana. They opened one package themselves, seized some of the marijuana, replaced it with sand and sent the altered materials to New York. There was no other source for the New York police action. What the New York police might have done had Richard Dunkel, the airlines clerk in California called them directly before he called the Los Angeles police, is not this case, and cannot excuse the actual illegality, the intervening tainted source by which the evidence was secured. This Court has said as much with reference to evidence seized after a search without a warrant, despite the existence of probable cause.

> "Belief, however, well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. Agnello v United States, 269 U.S. 20, 33 (1925); Taylor v United States,

286 U.S. 1 (1932); Jones v United States, 357 U.S. 393 (1958).

This court has, as in the above cases, repeatedly rejected analysis of the derivative evidence exclusionary rule on the basis of what the police might have done: "(T)he rights...against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." Silverthorne v United States, 251 U.S. 385, 392 (1920). The evidence obtained must actually have come from an independent source; the independent source may not justify the illegal police action, after the fact. Otherwise, "The better the government's case against an individual the freer it would be to invade his privacy. We cannot accept such a result." United States v Paroutian, supra, at 489. And, in this case, the independent source was merely a construct of the Court of Appeals hearing no relation to the actual source of Detective Tobin's information.

Nor may the search by Richard Dunkel be excused from Fourth Amendment proscriptions in order to serve as an independent untainted source of information in this case. It is clear that the airlines clerk was acting pursuant to previous conversation with the police during which they exhorted him to be on the lookout for marijuana in packages brought to him by "hippie types", and that his search was not authorized by his superiors as a legitimate carrier inspection. This search was made solely for the purpose of aiding the police in criminal prosecution, and the police must take responsibility for the consequent invasion of Fourth Amendment rights occasioned by their request. Corngold v United States, 367 F. 2d 1 (9th Cir. 1966). cf. Gambino v United States 275, U.S. 310 (1927). In the same way, evidence illegally seized by an employee of a corporation was suppressed because the documents were stolen for the purpose of aiding a Commission in a pending prosecution, and the Commission knowingly gave its approval to the employee's act by its use

of the evidence. Knoll Associates, Inc. v Federal Trade Commission, 397 F. 2d 530 (7th Cir., 1969). Further, superiors may search an employee's desk to find materials for office purposes but they may not consent for the employee to a police search for the fruits of crime. United States v Blok, 188 F. 2d 1019 (D.C. Cir., 1951). And a parole officer may search a parolee's dwelling without a warrant during the performance of his duties as a parole officer, but he must obtain a warrant if he does so on the request of law officers: "The parole office is in such a case acting nor as the supervising guardian, so to speak, of the parolee, but as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed." Smith v Rhay, 419 F. 2d 160, 162-163 (9th Cir., 1969); cf. United States v Small, 297 F. Supp. 582 (D.C. Mass, 1969). Thus, neither the private - public search distinction (Burdeau v McDowell, 256 U.S. 465 (1921), nor the distinction between police Jurisdiction should be applied when to do so is to permit the circumvention of the mandates of the Fourth Amendment on actual police conduct. Had Richard Dunkel called the New York police directly, he would have been doing so as an agent of the Los Angeles police; and as such, his search of the packages without a warrant was unlawful, the information thus transmitted to New York could not justify the police action there, either in hypothesis or in fact.

III

This Court has recently reaffirmed the necessity of the warrant as the cornerstone requirement of the reasonable search and seizure, and the per se unreasonableness of searches and seizures conducted without that protection.

> "....no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances."
>
> "..where the discovery is anticipated when the police

know in advance the location of the evidence... the requirement of a warrant to seize proposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of exigent circumstances." Coolidge v New Hampshire, 403 U.S., 443, 468, 470-471 (1971); cf. United States v Van Leeuwen, 397 U.S. 249 (1970).

There were no exigent circumstances in this case. The police knew the night before that the packages would arrive at Kennedy airport the next day. They had the package under continuous observation from the moment it arrived until the arrest of petitioner, sixteen hours later. The package was in the safekeeping of the airlines shipping authorities, in no danger of destruction. Sometime during those sixteen hours, or even after the phone call from the California police the night before, the New York police could have obtained a warrant.

The holding of the New York Court of Appeals herein that "No arrest warrant was necessary since the Dunkel information and the odor of marijuana gave Tobin probable cause to believe that a crime was being committed in his presence (citing only New York statute)", (See appendix, p. B-4) is in direct conflict with this Court's statement in Cooledge, supra, "No amount of probable cause can justify a warrantless search or seizure absent exigent circumstances' ". No such circumstances are shown in this case, and the argument that the odor of marijuana revealed the contraband in plain view does not justify the seizure absent thosecircumstances. "This Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds..." Cooledge v New Hampshire, supra, at 417 n 27.

IV

Petitioner was convicted of possession of marijuana without evidence that he knew the package he was carrying contained that substance. The address on the package contained the name of another man in care of petitioner, who was apparently delivering it to that man after picking it up at Kennedy Airport. Despite the New York Court of Appeals reliance on the words of the Illinois Supreme Court that:

> "The inference (of knowledge from mere possession) is based largely upon the nature of the commodity and the manner in which its illegal traffic is conducted... They are sold for exorbitant sums and are therefore of great value to person (sic) possessing them. Furthermore, since their mere possession may subject such person to severe criminal consequences, the narcotics traffic is conducted with the utmost secrecy and care..." (People v Nettles, 23 Ill 2d 306, 308).

We submit this as mere speculation. The inference is equally possible, based on all of the above, that the man with actual knowledge of the carton's contents would ask an innocent agent to retreive the package from the airport in order to protect himself from just the eventuality that brings petitioner herein before this Court. And, it may not be argued that petitioner has the duty to produce the man with actual knowledge, since that duty arises only once the presumption is assumed valid. Neither resort to human experience nor empirical data can supply the substantial assurance that at least in a majority of instances, wherein one man arrives at an airport or post office to claim mail addressed to another and has not had opportunity to actually discover what is in the package, that this man would have knowledge of the contents of the package. To so presume and to so convict on such a presumption is to deprive petitioner of a fair trial and due process of law. Leary v United States, 395 U.S. 6 (1969).

CONCLUSION

FOR THE ABOVE STATED REASONS A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Respectfully submitted,

ARTHUR W. LONSCHEIN,